Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 44

EMANUEL BROWN,
Petitioner,
against
UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. BERTRAM WEGMAN,
MYRON L. SHAPIRO,
Counsel for Petitioner,
60 Wall Street,
New York 5, N. Y.

Dated August 5, 1957

INDEX

CITATIONS

Cases

Constitutional Provisions, Statutes and Regulations

Supreme Court of the United States

OCTOBER TERM, 1957.

No.

EMANUEL BROWN,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Emanuel Brown, respectfully prays that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York convicting petitioner of criminal contempt by reason of petitioner's refusal to answer questions put to him by the Court in the presence of the grand jury. The sentence imposed was fifteen months. Petitioner was enlarged on bail of $5,000, pending appeal. The Court of Appeals has granted a stay of its mandate pending final disposition in this Court.

Opinion Below

The opinion of the Court below, per Lumbard, C. J., has not been officially reported and is printed *infra* at page 53.

The District Court's opinion on the question of law is not officially printed, but appears *infra* at page 10.

Jurisdiction

The judgment of the Court below was dated and entered on July 10, 1957.

Jurisdiction to review such judgment by the writ prayed for is conferred on this Court by Section 1254, Title 28, U.S.C. and is invoked pursuant thereto and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented for Review

1. Whether in a grand jury investigation of alleged offenses under §322 (*infra*, p. 43) of the Motor Carriers Act (Title 49, U.S.C.), a witness before that body obtains, pursuant to §305(d) (*infra*, p. 35) of that Act, immunity from prosecution for any transaction or offense concerning which he may under compulsion testify or produce evidence.

a. Whether Congress in enacting §305(d) (*infra*, p. 35) of the Motor Carriers Act, *supra*, intended to make the immunity provisions of §46 (*infra*, p. 35) of the Interstate Commerce Act (Title 49, U.S.C.) applicable to grand jury investigations under the Motor Carriers Act.

b. Whether, assuming *arguendo*, that some immunity was conferred upon petitioner by §305(d) of the Motor Carriers Act, it is co-extensive with his privilege against self-incrimination and, therefore, constitutionally sufficient to eliminate his privilege against self-incrimination.

2. Whether the procedure followed herein which resulted in petitioner's conviction of criminal contempt, pursuant to subdivision (a) (*infra*, p. 39) of Rule 42 of

the Federal Rules of Criminal Procedure, for refusing in the presence of the Court and the grand jury to answer certain questions previously put to him before the grand jury, was valid and proper.

a. Whether petitioner, after he had been directed by the District Court to answer before the grand jury certain questions put to him and had re-appeared before the grand jury and refused once more to answer the questions, was entitled, under subdivision (b) of Rule 42, Federal Rules of Criminal Procedure (*infra*, p. 39), the requirements of Due Process and the fundamental fairness requisite in Federal criminal proceedings, to notice, reasonable time for preparation and a statement of the criminal contempt charged.

(b) Whether, after petitioner returned to the grand jury pursuant to the order of the District Court, but refused again to answer the questions directed by that Court to be answered and was once more brought before the Court, the District Court could validly ignore Rule 42(b) of the Federal Rules of Criminal Procedure and refuse to afford petitioner notice, specification of charges, and reasonable time for preparation and compel petitioner to take the stand and testify and, upon petitioner's refusal to answer and his statement that he would refuse again to answer, if returned to the grand jury, convict petitioner of criminal contempt pursuant to Rule 42(a) as for a contempt committed in the presence of the Court.

(c) Whether the secrecy of the proceedings violated the requirement that a contempt judgment be public.

3. Whether the sentence of fifteen months imposed upon petitioner constituted cruel and unusual punishment or, an abuse of the District Court's discretion.

a) Whether in this criminal contempt proceeding the District Court had power to impose a sentence of more than one year.

b) Whether in this criminal contempt proceeding the District Court could impose a coercive sentence.

Constitutional Provisions, Statutes and Regulations Involved

The pertinent text of the constitutional provisions, statutes and regulations, being lengthy, are set forth as an appendix to this petition, *infra*, p. 35, *et seq.* Their citations follow:

United States Constitution, Amendments V, VI, VIII; *Motor Carriers Act*, Title 49, U.S.C., §§305(d), 322; *Interstate Commerce Act*, Title 49, U.S.C. §46; *Atomic Energy Act*, Title 42, U.S.C., §2201; *China Trade Act*, Title 15, U.S.C., §155(a), (c); *Civil Aeronautics Act*, Title 49, U.S.C., §644(i); *Code of Criminal Procedure*, Title 18, U.S.C., §§401, 1406, 3481, 3486; *Commodity Exchanges Act*, Title 7, U.S.C., §15; *Federal Trade Commission Act*, Title 15, U.S.C., §49; *Securities Act of 1933*, Title 15, U.S.C., §77(v), (c); *Merchant Marine Act*, 1936, Title 46, U.S.C., §1124(c); *Perishable Commodities Act*, Title 7, U.S.C., §499 m (f); *Taft-Hartley Act, Title* 29, U.S.C., §161 (3); *Social Security Act*, Title 42, U.S.C., §405(d), (f); *Rent Control Act*, Title 50, App., U.S.C., §1896; *Emergency Price Control Act*, 50 Stat. 30 (1942), §202(g); *Federal Communications Act*, Title 47, U.S.C. §409 (l); *Federal Deposit Insurance Corporation Law*, Title 12, U.S.C., §1820; *Industrial Alcohol Act*, Title 26, U.S.C., §3119 (1946 Ed); *Export Controls Act*, Title 50, App., U.S.C., §2026; *Defense Production Act of 1950*, Title 50, App., U.S.C., §2153; *War and Defense Contracts Acts of 1951*, Title 50,

App., U.S.C., §1152; *Second War Powers Act,* Title 50, App., U.S.C., §643a; *Investment Advisers Act,* Title 15, U.S.C., §80-b-9; *Investment Companies Act,* Title 15, U.S.C., §79r; *Securities Exchange Act,* Title 15, U.S.C., §78u; *Shipping Act, 1916,* Title 46, U.S.C., § 827; *Natural Gas Act,* Title 15, U.S.C., §717m; *Federal Rules of Criminal Procedure,* Rules 42(a), 42(b).

Statement of the Case

Petitioner is a principal of Young Tempo, Inc., a New York City dress manufacturer (10A).* T. and R. Trucking Company or T. and R. Cutting Company has transported dresses for Young Tempo, Inc. and Acme Dress Company between New York City and Midvale, New Jersey (10A). John Dioguardi is, according to the Government's information, the actual owner of T. and R. Trucking Company, although Theodore Rij is the nominal proprietor (10A).

Active in the Southern District of New York are a number of grand juries conducting a general racketeering investigation, as well as an investigation of the Victor Riesel obstruction of justice case (60A, 61A). The subjects of these investigations are John Dioguardi and Theodore Rij (also known as Ray) and possibly others (61A).

Petitioner appeared before two of these other grand juries pursuant to subpoena (32A). His grand jury appearances prior to this matter totaled at least eleven times (12A). Petitioner's first appearance before a grand jury related to the Riesel obstruction of justice case and the location of Rij (32A). Petitioner's subsequent appearances were before a grand jury investigating alleged racketeering in the garment trucking industry (32A).

---

*References thus are to the pages of the Appendix to the Appellant's Brief in the Court of Appeals filed with this petition.

At the time of the proceedings below, petitioner was still subject to the subpoena under which he appeared before the other grand juries (33A), his further appearance pursuant thereto having been adjourned.

Before the other grand juries, petitioner mainly claimed his privilege against self-incrimination, but, concededly, his testimony there "went part way into the area" with which the instant proceedings are concerned (34A, 35A).

Before the other grand juries, petitioner, and business associates were told by the same prosecutor who conducted the instant proceedings below, that petitioner was going to be indicted for violation of the Internal Revenue laws (35A).

On or about March 25th petitioner's counsel, at the prosecutor's request, attended at his office. He was told that the prosecutor was about to institute an investigation under the Interstate Commerce Act, that petitioner would be subpoenaed to appear before the Grand Jury conducting this investigation and that the immunity statute contained in the Interstate Commerce Act, Section 46, Title 49, U.S.A. (*infra*, p. 35), would apply and that the Fifth Amendment plea could not be interposed (11A, 12A).

Thereafter petitioner, having been served with a subpoena requiring his personal appearance before the April 1957 Grand Jury "to testify all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49 United States Code" (23A), appeared before the grand jury (22A).

Petitioner's counsel was present in the anteroom of the Grand Jury room. Petitioner was advised that "the foreman, should the occasion arise, will at reasonable intervals allow you to consult with your attorney if you feel you desire to do so" (22A, 23A).

Petitioner, after the requisite preliminaries were disposed of, was asked (23A): "Mr. Brown, are you associated with Young Tempo, Incorporated?"

Petitioner requested and received permission to speak with his attorney (23A). After such consultation, petitioner returned to the grand jury room, the question was read to him again, and he answered, "I refuse to answer because by answering I may tend to incriminate myself" (24A).

The prosecutor then advised petitioner before the Grand Jury "that this Grand Jury is conducting an investigation for possible violations of the Interstate Commerce laws, • • • and that under Title 49 United States Code, Section 305(d), the Congress • • • has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Section of the Interstate Commerce Laws • • • shall by virtue of his testimony be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony" and that he did "not have any privilege to plead the Fifth Amendment as to the questions which are going to be put to" him before this Grand Jury (24A, 25A).

Petitioner conferred again with counsel, returned to the grand jury room and refused to answer the question on the ground of possible self-incrimination (25A, 26A). Petitioner was then informed that, if he did not answer this question, he could "be brought before a Judge of this Court and directed to answer this and other questions?" (26A). After petitioner had again consulted with counsel (26A), the question as to his association with Young Tempo Inc. was once more put to him (26A) and he refused to answer on the ground of possible self-incrimination (27A).

Thereafter five more questions were put to the petitioner before the grand jury, all of which petitioner refused to answer on the ground of possible self-incrimination (27A-29A).

The questions answer to which was refused by petitioner because of possible self-incrimination are:

> 1. Mr. Brown, are you associated with Young Tempo, Incorporated? (23A). 2. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T & R Cutting Company or as the T & R Trucking Company? (27A) 3. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T & R Cutting or the T & R Trucking Company? (27A) 4. Mr. Brown, are you associated with the Acme Dress Company, in Midvale, New Jersey? (28A) 5. Mr. Brown, does the T & R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey? (28A) 6. Mr. Brown, do you know if the T & R Trucking Company or the T & R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey? (28A)

After the petitioner's refusal to answer the above questions, the grand jury, the Assistant United States Attorneys and the petitioner and counsel proceeded to the courtroom of District Judge Levet.

At the Court's request, the prosecutor outlined the procedure requested by the Government to be followed.

The courtroom was cleared and the proceedings throughout were private (7A).

The prosecutor stated that the grand jury requested the Court's aid and assistance in a direction to the petitioner to answer the questions put to him (7A, 8A).

Further outlining the procedure requested, the prosecutor stated that at the termination of that hearing "if the Court determines that the witness in fact must answer the questions, that the Court direct him to answer the questions" and that "at that point it would be the Government's intention to have the grand jury and the witness return to the grand jury room, at which point the same questions would be put to the witness" (9A).

Upon further refusal by the petitioner to answer on his return to the grand jury room, the prosecutor said, the grand jury and petitioner would return to the Court with a second request that the same questions be put to the witness and, if he then refused to answer, "the Government would ask that he be held summarily in contempt according to the procedure of Rule 42 (a) of the Federal Rules of Criminal Procedure, and for a violation of Section 401, Subdivision 3 [*infra*, p. 40], which makes punishable as contempt the disobedience of a lawful order of the Court" (9A).

The prosecutor also stated, at the request of the Court, the general nature of the inquiry to be that the Government's information was "that contrary to the law this T. & R. Trucking Company neither applied for nor received a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey (10A, 11A).

At this point petitioner's counsel reminded the Court that in his off-the-record discussion of procedure the

prosecutor had said "that the Government's position was that this was the only hearing" petitioner was "entitled to" and applied for and requested a reasonable adjournment and "a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and be able to properly represent our client", which request was denied (11A).

The existence of issues of fact was indicated to the Court by petitioner's counsel (12A, 13A, 21A, 30A).

After argument on the applicability of the immunity sections of the Motor Carriers Act, Title 49, U.S.C., Sec. 305(d) (*infra*, p. 35), the Government called the grand jury stenographer as a witness. She read her untranscribed minutes of the proceedings in the grand jury room (22A, *et seq.*). When she finished, an adjournment was requested by petitioner's attorney (30A), but not granted.

Argument was then had before the Court on the issues raised by the appearance of the petitioner before other Grand Juries (31A-38A), and on some other issues involved (38A, 39A) and on the question of the incriminatory nature of the questions put to petitioner (39A).

This part of the proceedings took place on Friday, April 5th, 1957. The parties were directed by the Court to return on Monday, April 8th at 2:00 P.M. (43A).

On Monday, April 8th, 1957 (44A) the Court rendered its decision, as follows (44A, 45A, 46A):

> "In this matter I have determined that the witness must testify as to the questions which were propounded. I believe that the statutory sections, particularly Sections 305(d), Title 49 and Section 46 of Title 49 adequately provide for immunity in the instances involved; I believe that the immunity applies to a grand jury, see Brown *v.* Walker, 161 U. S. 59.

I believe in general that the immunity applies in the State Courts, see Adams *v.* Maryland, 347 U. S. 179.

The immunity exists even though no privilege is claimed, see U. S. *v.* Monia, 317 U. S. 424.

The United States Attorney is charged with enforcement of the United States criminal laws and under the Rules of Criminal Procedure I believe that the witness must answer. Therefore I direct this witness, Emanuel Brown, to answer the questions propounded as they were repeated before me on Friday".

• • •

"I do not think the fact that this witness has testified before other grand juries affects this situation. I have considered it. I do not believe that it is pertinent at all here. He is immune from prosecution for all matters on which he is questioned before this grand jury. That covers it."

The grand jury was then directed by the Court to retire (46A). Counsel for petitioner requested an adjournment to consult with his client (45A). A postponement for thirty minutes was granted (46A).

Petitioner, pursuant to the Court's direction, returned to the grand jury room and the six questions directed by the Court to be answered were again put to him (49A, 50A).

Petitioner refused to answer on the ground of possible self-incrimination (49A, 50A). The grand jury, petitioner and counsel then proceeded again to the courtroom of District Judge Levet (47A).

At that time the prosecutor stated to the Judge that the grand jury "again wishes to request the aid and assistance of the Court with reference to the witness Emanuel Brown (petitioner)" (47A).

Discussion was then had again as to the nature of this proceeding (47A, 48A).

The prosecutor said (47A): "At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, * * *, that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure."

And the Court stated "That is what I propose" (48A).

Counsel for petitioner excepted to this procedure and requested compliance with Rule 42 (b) (*infra*, p. 39) and a notice of the charges and specifications and an opportunity for a full hearing (48A). The public was excluded.

This request and objection were overruled (48A). The grand jury stenographer was then called and read his untranscribed minutes (48A, *et seq.*) which disclosed petitioner's refusal before the grand jury to answer the questions set forth above on the ground of possible self-incrimination.

The Court, over objection and exception, directed appellant (51A) to take the stand in the courtroom.

Petitioner's counsel also objected on the ground that petitioner was being compelled to be a witness in a criminal cause against himself, which objection was overruled (51A).

The Court did not swear the petitioner, but deemed him to be under oath since he had been sworn in the proceedings before the grand jury, it being the Court's theory that this proceeding was "a continuance of the Grand Jury proceeding before the Court" (52A). Petitioner's counsel took further exception and objection to this proceeding (52A).

The Court then put to petitioner the same six questions (*supra*, p. 8) over the specific objection of petitioner's counsel to each question (52A-54A) and as to each question petitioner refused to answer on the ground of possible self-incrimination (52A-54A).

The Court, repeating each question then directed the petitioner to answer, which interrogation and directions were done over the objection of petitioner's counsel (55A-57A).

To each of the questions and directions petitioner maintained his refusal to answer on the ground of possible self-incrimination (55A-57A).

At the Government's request the Court then asked petitioner "whether he would maintain his refusal to answer, if he returned to the grand jury room" which inquiry was made over the objection of petitioner's counsel (57A). Petitioner answered this inquiry in the affirmative (57A).

Petitioner was then asked, over counsel's objection, whether he believed that these answers would incriminate him in any way and petitioner refused to answer (57A).

The Court then stated that "by reason of petitioner's refusal to answer in the actual presence of this Court, I am forced to act upon this matter" (58A). Counsel for petitioner objected to the whole proceeding and asked again for notice and specifications and an opportunity to be heard, which objection and request were overruled (58A).

The Court then permitted counsel to argue as to why an adjudication of contempt should not be made (58A, which counsel did (59A, *et seq.*).

Petitioner's counsel argued, *inter alia*, that the purported immunity did not exist, that petitioner should have a full hearing on the issues of fact involved herein, that the whole procedure was bad and objectionable on the ground that, irrespective of the question of immunity, petitioner's constitutional rights in a criminal cause were seriously infringed by his being compelled to take the stand and being sworn and being asked questions, that in this proceeding, entirely separate and apart from the grand jury proceedings, it was wrong to ask petitioner as to whether he believed that answering the questions would incriminate him and that the failure to give petitioner notice and an opportunity to defend was in violation of due process and of petitioner's rights under the Constitution and that the proceeding was being used by the United States Attorney as a device or subterfuge or artifice to circumvent petitioner's constitutional rights (59A-60A).

The Court nonetheless adjudicated petitioner in contempt (60A).

Counsel for the government was then heard by the Court on the question of sentence and in that regard counsel for the Government said, among other things, the following (61A, 62A):

> "For these reasons • • •, the Government here would ask for a substantial sentence, and that is done not so much for any punitive effect as it would be for the coercive effect of the sentence.
>
> Under the statute there is no maximum penalty upon the sentence that your Honor may impose. The only maximum is that imposed by the Constitution against cruel and unusual punishment.

I would further ask • • • that • • • your Honor not include a purge clause. • • •"

Following this request by the United States Attorney for a coercive sentence rather than a punitive sentence, the Court sentenced the petitioner to be confined for a period of one year and three months (64A).

Argument

The reasons relied on by petitioner for the allowance of the writ are these:

1. The decision below is in conflict with the decisions of other Courts of Appeals on the same matter;

2. The Court below has rendered a decision in conflict with applicable decisions of this Court;

3. The Court below has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision;

4. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

I.

In deciding that a witness who testified in a grand jury inquiry as to possible offenses under §322 (*infra*, p. 43) of the Motor Carriers Act obtained immunity pursuant to Section 305(d) (*infra*, p. 35) "just as if they were testifying in a grand jury inquiry under Title I". (Interstate Commerce Act, Title 49 U.S.C. §46, *infra*,

p. 35), the Court of Appeals decided important questions of Federal law which have not been but should be settled by this Court.

The Motor Carriers Act does not have a separate immunity provision and Congress in §305(d) (*infra*, p. 35) of that act incorporated by reference the immunity provision contained in §46 (*infra*, p. 35) of the original Interstate Commerce Act.

In determining whether a witness obtains immunity by his testimony before a specific body, it is necessary always to determine whether the particular immunity statute by its terms applies to the body before which the witness is appearing—here a grand jury.

The statute here involved [§305(d), Motor Carriers Act (*infra*, p. 35)] provides first for the power of the Commission to administer the Act and to require by subpoena the attendance and testimony of witnesses and the production of books and documents and to take testimony by deposition.

This grant of power contained in the first clause of §305(d) is then modified by the language "relating to any matter under investigation, as the commission has in a matter arising under Chapter 1 of this title [Title 49, U.S.C.]."

Following this modifying phrase is a semi-colon and a second clause is then set forth reading "and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same • • • immunities • • • as though such matter arose under Chapter 1 of this title, unless otherwise provided in this chapter."

In statutory construction, this Court has held, "punctuation marks are no part of an act" and "to determine the intent of the law, the court • • • will disregard

the punctuation" (*U. S.* v. *Shreveport Grain & E. Co.*, 287 U. S. 77, 82, 83). Consequently, the whole of §305(d) of the Motor Carriers' Act must be read together.

In the first clause of subdivision (d) of Section 305 the power of the Commission to take testimony and to compel the production of papers relates "to any matter under investigation". Then in the second clause the grant of immunity is limited to "any person subpoenaed or testifying in connection with any matter under investigation under this chapter." Necessarily the re-use of the words "in connection with any matter under investigation under this chapter" discloses an intent by Congress to relate back to the prior use of the same words "any matter under investigation" in the first clause of Section 305(d) and, therefore, an intent to limit the immunity to investigations before the Commission and not to extend the immunity to investigations by grand jury.

It is a necessary implication in the second clause of Section 305(d) after the words "any matter under investigation" that the words "by the Commission" be inserted. Congress having used these words before in the same sentence and having limited those provisions to the Commission obviously did not deem it necessary as a matter of draftsmanship to repeat the words "by the Commission"; as ordinary rules of statutory construction would necessarily require their implication.

The language chosen by Congress in effect displaced and excised from §46 of the Interstate Commerce Act as made applicable to the Motor Carriers Act by §305(d) the words "testifying • • • in any cause or proceeding criminal or otherwise based upon, or growing out of any alleged violation of Chapter 1".

If Congress intended the immunity to extend to grand jury proceedings and proceedings other than before the

Commission it must be held to have known "the phraseology necessary to reach this result" (Crane, J., *Matter of Doyle,* 257 N. Y. 244, 268, 269).

The words of art necessary and most often used for the purpose of extending the immunity to grand jury or court proceedings are "in any proceeding" or "in any suit or proceeding" or "in any cause or proceeding, criminal or otherwise" or "in any action or proceeding" or "in any cause or proceeding instituted by the Commission" or "in any proceeding, suit or prosecution". See *Federal Communications Act,* Title 47, U.S.C., §409(l) (*infra,* p. 52); *Civil Aeronautics Act,* Title 49, U.S.C.A. §644(i) (*infra,* p. 47); Second War Powers Act, (1946), Title 50 U.S.C., App. §643(a) (*infra,* p. 49); *War and Defense Contracts Acts* (1946), Title 50 U.S.C., App., §1152 (*infra,* p. 49); *Shipping Act of 1916,* Title 46, U.S.C., §827 (*infra,* p. 51); *Industrial Alcohol Act,* Title 26, U.S.C. (1946 ed.), §3119 (*infra,* p. 47), now §5315, Title 26 U.S.C.; *Securities Act of 1933,* Title 15, U.S.C., §77v (c) (*infra,* p. 37); *Securities Exchange Act,* Title 15, U.S.C., §78u (d) (*infra,* p. 51); *Public Utility Holding Company Act,* Title 15, U.S.C., §79r (e) (*infra,* p. 50); *Natural Gas Act,* Title 15, U.S.C., §717m (h) (*infra,* p. 52); *Investment Advisers Act,* Title 15, U.S.C., §80-b-9 (d) (*infra,* p. 50); *Investment Companies Act,* Title 15, U.S.C., §80a-41 (d) (*infra,* p. 50).

Actually, it is not the inclusion of the words "before the Commission" which is necessary to limit immunity to testimony before the Commission, it is the use of the foregoing phraseology "in any cause or proceeding" or the other similar language which is required *to extend* the immunity power to grand juries or court proceedings; these words or words of similar import having been held by this Court in *Hale* v. *Henkel,* 201 U. S. 43, 66 (1906) to extend immunity to grand jury and court proceedings.

Here the use by Congress in §305(d) of the Motor Carriers Act, of the language "testifying in connection with any matter under investigation under this chapter", which operated to remove the language "any cause or proceeding, criminal or otherwise" from §46 as incorporated into §305(d), prevented and prevents the immunity provisions from extending to grand jury proceedings.

The enactment by Congress of an immunity provision limited to hearings or investigations by a Commission and insufficient in scope to extend to Grand Jury investigations is not. See *Federal Trade Commission Act*, Title 15, U.S.C.A., Ch. 2, §49 (*infra*, p. 36); *Taft-Hartley Act*, Title 29, U.S.C., 161(3) (*infra*, p. 38); *Merchant Marine Act*, 1936, Title 46, U.S.C., §1124(c) (*infra*, p. 37); *Perishable Commodities Act*, Title 7, U.S.C., §499m(f) (*infra*, p. 38); *China Trade Act*, Title 15, U.S.C., §155(a), (c) (*infra*, p. 40); *Social Security Act*, Title 42, U.S.C., §405(d), (f) (*infra*, p. 41); *Atomic Energy Act*, Title 42, U.S.C., §2201 (*infra*, p. 41); and the *Rent Control Act*, Title 50, App., U.S.C., §1896 (*infra*, p. 42).

It should be noted that §305(d) of the Motor Carriers Act is not the only enactment by Congress which, although incorporating §46 of the Interstate Commerce Act by reference, did not extend the immunity power beyond the particular administrative officer or board involved. See *Commodity Exchange Act*, Title 7, U.S.C. (1946 ed.), §15 (*infra*, p. 45); *Emergency Price Control Act*, §202(g), 56 Stat. 30 (1942) (*infra*, p. 45); See also *Export Controls Act*, Title 50, U.S.C., App., §2026(a) and (b) (*infra*, p. 47). [In the *Narcotics Control Act*, Title 18, U.S.C., §1406 (*infra*, p. 51), the *Immunity Act of 1954*, Title 18, U.S.C., §3486 (*infra*, p. 45) and the *Defense Production Act of 1950*, Title 50, U.S.C., App., §2155(a), (b) (*infra*, p. 48), Congress specifically

mentioned the grand jury as a body before which immunity may be obtained. In the Federal Deposit Insurance Corporation Law, Title 12 U.S.C., §1820(c), (d) (*infra*, p. 46), while the Board of Directors may apply to a judge or clerk of any United States Court for a subpoena, the immunity power extends only to a hearing, examination or investigation by the Board].

Illustrative of the converse of the situation which confronts the petitioner here is the case of *Blaine* v. *United States*, 29 F. 2d 651 (C.A., 5th) which arose under the National Prohibition Act which provided in §47, 27 U.S.C.A. (1927 ed.) that "no person shall be excused, on the ground that it may tend to incriminate him * * * from * * * testifying * * * in obedience to a subpoena of any court in any suit or proceedings based upon or growing out of any alleged violation of this chapter."

In the *Blaine* case, *supra*, one of the defendants claimed immunity under this provision of the National Prohibition Act, on the ground that he appeared and gave evidence of a revocation hearing conducted by the Prohibition Administrator. The Court of Appeals held that he had not brought himself within the terms laid down by the statute "for the reason that he did not testify in obedience to the subpoena of any court". See *Sherwin* v. *United States*, 268 U. S. 369.

Even if it were to be held that the District Court and the Court of Appeals were correct in holding that §305(d) incorporated §46 *in toto*, the question then arises as to whether the immunity attempted to be provided is constitutionally sufficient, that is, whether it is coextensive with the petitioner's constitutional privilege against self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547.

§305(d) commences with the language "so far as may be necessary for the purposes of this chapter". This language is a limitation of the immunity and makes it futile and worthless.

If, for example, the Government in the questioning of petitioner before the grand jury went beyond the concededly incriminatory questions put to the petitioner, which we assume *arguendo* to be relevant to an investigation under the Motor Carriers Act, and inquired as to matters beyond the scope of such an investigation, such as possible Internal Revenue violations and other offenses, is it not possible for the Government then to argue that all that was done before the grand jury which was necessary for the purposes of the Motor Carriers Act were the questions now asked of the petitioner and that all the other inquiries were not so necessary and the immunity consequently did not apply?

If the Government were correct in such an argument, then petitioner, deprived of his privilege by this immunity provision, would be liable to prosecution based on his own testimony, if the same were incriminatory.

Petitioner would also, if this possible Government argument were made and upheld as to the limitation on the immunity provision, be in this position—having been asked concededly incriminatory questions at the very outset of the investigation and having, let us suppose, failed *in limine,* contrary to his action here, to claim his privilege against self-incrimination—he would be deemed to have waived the privilege and would then be liable in contempt for failing to answer in the other fields of investigation or to indictment on the crimes, if any, disclosed by his testimony other than on matters under the Motor Carriers Act. *Cf., U. S.* v. *Price,* 96 Fed. 960 (D. Ky.).

Even if petitioner in answering the questions involved here touched incidentally upon other crimes, it would be open to the Government to argue that such testimony was not necessary for the purposes of the Motor Carriers Act.

Consequently, it is submitted, the immunity purported to be granted by Section 305(d) is not co-extensive with the privilege.

The immunity purportedly granted is not co-extensive with the privilege of the petitioner against self-incrimination for the further reason that he has been before two other grand juries in the Southern District of New York, in the course of which he was told by the prosecutor that he is a prospective defendant. The petitioner continues under subpoena to appear before the other grand juries.

In this situation the Government in the present investigation of possible violations of the Motor Carriers Act may develop clues and leads which will furnish it with evidence which it can use before the other grand juries for the purpose of incriminating petitioner and causing his indictment and prosecution.

Consequently, despite the language of §46, Title 49, U.S.C., the petitioner's situation is markedly similar to that of the witness in *Counselman* v. *Hitchcock, supra,* where this Court said at page 564:

> "It remains to consider whether §860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. * * * It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testi-

mony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

"The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of §860 is not co-extensive with the constitutional provision."

The application of §305(d) and §46 to petitioner raises, consequently, substantial and important questions of Federal law which have not been but should be settled by this Court [also pending in the Court of Appeals for the Second Circuit is another case entitled *U. S.* v. *Morry Levine,* which involves *inter alia* the same questions under §305(d) and §46 as herein embraced].

II.

This case presents to this Court for review the validity of the proceedings in the Second Circuit for the handling of recalcitrant grand jury witnesses before grand juries. *Cf: U. S.* v. *Curcio,* 234 F 2d 470 [Certiorari granted 1 L. Ed. (2d) 45, reversed on other grounds 1 L. Ed. (2d) 1225].

The procedure followed here by the District Court and approved by the Court of Appeals is, it is respectfully submitted, in direct conflict with the holding of the First Circuit Court of Appeals in *Carlson* v. *U. S.,* 209 F. 2d 209, and of the Court of Appeals for the District of Columbia in *Wong Gim Ying* v. *U. S.,* 231 F. 2d 776, 779, 780 [see also *Powell* v. *U. S.,* 226 F. 2d 269 (App. D.C.)].

The procedure approved below is also in conflict with the decision of this Court in *Ex Parte Savin,* 131 U. S. 267, 277.

Moreover, this procedure followed in the Second Circuit has the effect of obliterating subdivision (b) of Rule 42 of the Rules of Criminal Procedure insofar as applicable to the recalcitrant grand jury witnesses.

The rights of a witness claimed to be recalcitrant and criminally contumacious before a grand jury have been well established.

Rule 42(b) (*infra,* p. 39) of the Rules of Criminal Procedure requires that criminal contempts shall be prosecuted on notice, stating the place and time of hearing and the essential facts constituting the criminal contempt charge and allowing a reasonable time for the preparation of the defense.

Rule 42(b) is of course only the application to criminal contempts of the requirements of due process contained in the Fifth Amendment (*infra,* p. 39) to the Constitution and the fundamental fairness required to be a necessary attribute of Federal criminal procedure.

But the rights of a party to a criminal contempt proceeding go beyond mere notice, opportunity to prepare and hearing. The usual safeguards surrounding criminal prosecution must be afforded to the party. *Cammer* v. *U. S.*, 350 U. S. 399, 403; *Re Michael,* 326 U. S. 224; *Nye* v. *U. S.,* 313 U. S. 33. Otherwise "too great inroads on the procedural safeguards of the Bill of Rights" would be permitted. *Re Michael, supra,* 227.

As pointed out in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 444:

> "* * * it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself."

Measured against these basic requirements of a proceeding in criminal contempt, namely notice, opportunity to prepare, hearing, presumption of innocence, proof of guilt beyond a reasonable doubt and the witness' right not to testify against himself, the proceedings in this case and in other similar cases in the Second Circuit fall far short and obviously constitute merely a putatively clever device to circumvent these principles and to deprive the witness of his rights.

The procedure here and in other such proceedings in the Second Circuit are so contrived that the commission of the alleged contempt and the adjudication is one interrelated action.

The sudden and almost miraculous transmutation of a proceeding (described not as a hearing but merely an attempt to obtain the assistance of the Court) into a criminal contempt done in the presence of the Court (although actually done, if at all, in the presence of the grand jury in its room) which is the hallmark of this type of proceedings in the Second Circuit is the means which enable the Government to debase the fundamental rights of parties which adhere to any criminal proceeding including one for criminal contempt.

The claim that the proceeding was merely an attempt to secure the assistance of the Court in obtaining the testimony of the petitioner is self-evidently spurious. Is it not clear that from the time that the petitioner first appeared before the District Judge at the direction of the grand jury until the time when the District Court finally directed him, question by question to answer, the petitioner was in jeopardy and faced, in view of the announced purpose of these proceedings in the Second Circuit and their characteristic endings, a finding of criminal contempt purportedly committed in the presence

of the Court and, hence, put on the defense of his claimed right not to answer these questions and of his conduct?

It is no answer to petitioner's contention to say that he had a hearing, in that the Court listened to his counsel's arguments, when he was not permitted to make any defense on the issues of fact existent in the matter and his presumption of innocence was abrogated and he was compelled to take the stand.

Besides it was, if a hearing, held before the offense, if any, was committed—certainly a novel doctrine.

The correct procedure in a situation such as is presented here is very well set forth in *Carlson* v. *U. S.*, 209 F. 209, 216 (C.A., 1) and *Wong Gim Ying* v. *U. S.*, 231 F. 2d 776, 779, 780.

In the *Carlson* case the Court described the proper procedure, as follows: If the witness is recalcitrant on the ground of his claim of possible self-incrimination, he is to be brought before the Court and the Court is to rule on the availability of the witness' claim of privilege; if the privilege is overruled by the Court, it "would then normally instruct the witness to go back to the grand jury and answer the question. If the witness then and there, in the face of the Court, declined to do so, this is disobedience to a lawful order of the Court, under 18 U.S.C., Section 401(3); and since this disobedience occurs in the 'actual presence' of the Judge it may be punished summarily under Rule 42(a) [*infra*, p. 39]."

Hence, according to the *Carlson* case, if at this point the witness *refuses to return* to the grand jury room and answer the questions, it is his *refusal to return*, which is a contempt committed in the presence of the Court and punishable summarily.

But, if the witness returns to the grand jury room the First Circuit said in *Carlson* at page 216:

> "* * * and there again refuses to answer the question which the court directed him to answer, this is still disobedience of a lawful order of the court within the meaning of 18 U.S.C. §401(3). But because such disobedience did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the court would have to conduct the proceeding in criminal contempt in accordance with Rule 42(b)."

It is at this point where Second Circuit proceedings branch off from the proceedings outlined in the *Carlson* case as proper and proceed post-haste to the deprivation of the witness' fundamental rights.

In the *Carlson* case, it was made clear that, at this point, if the witness still claimed his privilege, it was not a criminal contempt proceeding and the "worst that could happen, if the ruling is against him (the witness), is that he would be given a second chance to go before the grand jury and answer the questions". *Cf., Powell* v. *U. S.*, 226 F. 2d 269.

If, on the other hand, he is being charged with misconduct in the jury room, constituting misbehavior in the presence of the Court, the Court in *Carlson* said that "this charge must be prosecuted on notice, and under Rule 42(b) the notice 'shall state the essential facts constituting the criminal contempt charged and describe it as such'".

Then specifically directing itself to a situation identical with that presented by this case, the Court said at page 216:

> "If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being ad-

> vanced in bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the court within the meaning of 18 U.S.C. §401(1) [*infra*, p. 42]) the required notice under Rule 42(b) would have to describe the alleged misbehavior in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege."

It is respectfully submitted that this procedure outlined in the *Carlson* case is obligatory in a proceeding such as presented by this case and because not followed the proceedings here are vitiated.

Especially applicable here is the language of this Court in *Re Oliver*, 333 U. S. 257, 275:

> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case [267 U. S. 517] requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public'.

And in the *Oliver* case this Court said that "the right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the Court's authority'." 333 U. S. 257, 278.

Because of the existence of Rule 42(b) (*infra*, p. 39) it is quite clear that Rule 42(a) can only apply to acts actually done in the presence of the Court which tend to demoralize the Court's authority before the public. Since, however, the refusal of the witness to testify before a grand jury occurs in a grand jury room, what reason can there be to invoke Rule 42(a) in the manner followed here other than to circumvent Rule 42(b) and to do indirectly what cannot be done directly? *Wong Gim Ying* v. *U. S.*, *supra*.

Thus a strange procedure has been established in which a witness is compelled to commit the allegedly wrongful act again in the presence of the Court so that his rights and privileges can be avoided.

The conflict between the decision here and those of other Courts of Appeal and with decisions of this Court is clear. Moreover there has been such a departure here from the usual course of judicial proceedings, as to call for this Court's power of supervision.

III.

The Court of Appeals held that the District Court had the right to compel petitioner to take the stand and to answer questions. It specifically held that the proceeding was not a criminal proceeding but merely one which was "ancillary to the grand jury investigation".

The Court of Appeals also held that to prevent the District Court "from inquiring of the witness whether he is willing to answer questions, would frustrate the proper operations of the grand jury • • •" and that the "Court is merely being advised as to what had already happened before the grand jury". This latter holding of the Court of Appeals is directly contrary to the holding

of this Court in *Ex Parte Savin*, 131 U. S. 267, 277, where Mr. Justice Harlan said:

> "It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof and without issue or trial in any form' * * *; whereas, in cases of misbehavior of which the Judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished."

Here the District Court knew of the contempt only through the confession of the petitioner obtained in violation of his fundamental rights in a criminal case not to take the stand and testify and through the testimony of others, namely, the Grand Jury stenographer. Under *Ex Parte Savin, supra,* and Rule 42(b) of the Rules of Criminal Procedure, the practice followed here was consequently invalid and improper.

With respect to the first ground stated by the Court of Appeals for the rejection of petitioner's contention that he should not have been compelled to take the stand before the District Court, namely, that the proceeding was not a criminal proceeding and merely ancillary to the grand jury investigation, the fact is that from the moment petitioner was returned to the District Court after having refused for the second time to answer the questions put to him before the grand jury, he was in jeopardy of his liberty and the proceeding was, therefore, criminal in nature. Whether ancillary or plenary, or merely, as the

District Court thought, an extension of the grand jury proceeding, jeopardy for the petitioner existed and the proceeding was criminal in nature.

This Court has held that in proceedings which result in a judgment of criminal contempt, the defendant is entitled to the rights accorded to the defendant in criminal cases. *Cammer* v. *U. S.* 350 U. S. 399, 403; *Re Michael,* 326 U. S. 224; *Nye* v. *U. S.,* 313 U. S. 33; *Michaelson* v. *U. S.,* 266 U. S. 42, 66; *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 444.

And, as pointed out by Judge Goddard, in *U. S.* v. *Lawn,* 115 F. Supp. 674, 677, it is in a criminal case "a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged • • • it would invalidate the trial. • • • Title 18 U.S.C.A., Section 3481 makes a defendant a competent witness *at his own* request. It is thus improper to call him as a witness without a request on his part". *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 444; See *U. S.* v. *Scully,* 225 F. 2d 113 (C.A. 2nd).

These basic and important questions of constitutional law affecting criminal contempt proceedings and the differing procedures followed in the several circuits make necessary the review of this case by this Court.

IV.

In this case petitioner received a sentence of one year and three months. The Court of Appeals held that the sentence did not violate the Eighth Amendment to the Constitution (*infra,* p. 44) and that it was not an abuse of the District Court's discretion and that the District

Court could impose a coercive sentence in a criminal contempt proceeding without providing a purge clause.

In *U. S.* v. *Green*, 241 F. 2d 631 (C.A. 2d) this Court has granted certiorari, 1 L. Ed. 2d Adv. 1135. In the *Green* case two of the questions involved are also here presented.

These questions are whether the sentence was an abuse of discretion of the District Court and whether the District Court in a criminal contempt proceeding could impose a sentence of more than one year.

The Court of Appeals here held the sentence proper in view of the sentences in *Warring* v. *Huff*, 122 F. 2d 641 (App. D.C.) [two consecutive sentences of thirteen months]; *Conley* v. *U. S.* 59 F. 2d 929 (C.A., 8) [two years]; and *Hill* v. *U. S.*, 300 U. S. 105 [concurrent sentences of a year and a day and two years.]

On the other hand the Court of Appeals ignored much lesser sentences imposed by District Courts in its circuit upon recalcitrant grand jury witnesses. In *U. S.* v. *Gordon*, 236 F. 2d 916, the sentence was six months. In *U. S.* v. *Courtney*, 236 F. 2d 921, the sentence was three months. In *U. S.* v. *Trock*, 232 F. 2d 839, the sentence was four months. In *U. S.* v. *Curcio*, 234 F. 2d 470, the sentence was six months. In *U. S.* v. *Weinberg*, 65 F. 2d 394, the sentence was sixty days.

Both the District Court and the Court of Appeals omitted to consider as an element in determining the sentence the penalty attached by Congress to the substantive criminal offense involved. Here, under Section 322 of the Interstate Commerce Act, the only punishment which could be imposed upon petitioner is a fine. This failure to consider the quantum of the penalty attached to the substantive criminal offenses is in conflict with *Moore* v. *U. S.*, 150 F. 2d 323 (C.A. 10th). The United

States attorney did not request a specific sentence but insisted upon a strong coercive sentence, as he characterized it (60A-63A) and this sentence was the result.

This Court has held that the sentence in a criminal contempt proceeding must be punitive and not coercive. *U. S. v. United Mine Workers,* 330 U. S. 258, 302. On the other hand, if the sentence could be coercive, a purge clause necessarily had to be included which was not done here.

CONCLUSION

The writ should be granted and the judgment below reviewed by this Court.

For which your petitioner will forever pray, etc.

Respectfully submitted,

By J. Bertram Wegman and
Myron L. Shapiro,
his counsel.

Dated August 5, 1957

APPENDIX TO PETITION

Statutes and Rules Involved

Motor Carriers Act, Immunity Provision, Title 49, U.S.C., Ch. 8, Section 305(d):

> "So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter."

Interstate Commerce Act, Immunity Provision, Title 49, U.S.C., Ch. 2, Section 46:

> "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of

him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

Federal Trade Commission Act, Immunity Provision, Title 15, U.S.C., Ch. 2, Section 49:

"For the purposes of sections 41-46 and 47-58 of this title the commission, * * * shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or sub-

jected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it * * *."

Securities Act of 1933, Immunity Provision, Title 15, U.S.C., Ch. 2A, Section 77v (c):

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

Merchant Marine Act, 1936, Immunity Provision, Title 46, U.S.C., Section 1124(c):

"No person shall be excused from attending and testifying or from producing books, papers, or other documents before the Commission, or any member or officer or employee thereof, in any investigation instituted by the Commission under this chapter, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him

to a penalty or forfeiture; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, * * *."

Perishable Commodities Act, Immunity Provision, Title 7, U.S.C., Section 499m (f):

"No person shall be excused from attending, testifying * * * before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary or any such officer or employee, in any cause or proceeding, based upon or growing out of any alleged violation of this chapter, * * * upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him * * *. But no natural person shall be prosecuted * * * for or on account of any transaction, matter, or thing, concerning which he is compelled under oath so to testify, * * * before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary, or any such officer or employee, * * * or in any such cause or proceeding: * * *."

Taft-Hartley Act, Immunity Provision, Title 29, U.S.C., Section 161(3):

"No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted

* * * for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, * * *."

Federal Rules of Criminal Procedure:

Rule 42. Criminal Contempt

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the fact and shall be signed by the judge and entered of record.

"(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Code of Criminal Procedure:

§401. Title 18, U.S.C. Power of court

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

§3481, Title 18, U.S.C. Competency of accused

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

China Trade Act, Title 15, U.S.C., § 155.

"(a) For the efficient administration of the functions vested in the registrar by this chapter, he may require, by subpoena issued by him * * * (1) the attendance of any witness and the production of any book, paper, document, or other evidence. * * * The registrar, or any officer, employee, or agent of the United States authorized in writing by him, may administer oaths and examine any witness * * *.

"(c) No person shall be excused from so attending and testifying * * * on the ground that the testimony * * * required of him may tend to incriminate him * * * but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify * * *."

Social Security Act, Immunity Provision, Title 42, U.S.C., § 405, (d) (f).

"(d) For the purpose of any hearing, investigation, or other proceeding authorized or directed under sections 401-409 of this title, or relative to any other matter within his jurisdiction hereunder, the Administrator shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Administrator * * *.

"(f) No person so subpoenaed or ordered shall be excused from attending and testifying * * * on the ground that the testimony or evidence required of him may tend to incriminate him * * * but no person shall be prosecuted * * * for, or on account of, any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * *."

Atomic Energy Act, Immunity Provision, Title 42, U.S.C., § 2201.

"(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or

orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. No person shall be excused from complying with any requirements under this paragraph because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

Rent Control Act, Immunity Provision, Title 50, U.S.C., War App., § 1896.

"(f) (1) The Housing Expediter is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information, as he deems necessary or proper to assist him in prescribing any regulation or order under this Act * * * or in the administration and enforcement of this Act * * * and regulations and orders prescribed thereunder.

"(3) For the purpose of obtaining information under this subsection, the Housing Expediter may by subpoena require any person to appear and testify or to appear and produce documents, or both, at any designated place. * * *

"(6) No person shall be excused from attending and testifying or producing documents or from complying with any other requirement under this subsection because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 [section 46 of Title 49], shall apply with respect to any individual who specifically claims such privilege."

Motor Carriers Act, Title 49, U.S.C., § 322.

"Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement; or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

* * * * *

"(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

"(d) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or

information which may come to his knowledge during the course of any examination or inspection made under authority of section 320 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than $500 or imprisonment for not exceeding six months, or both."

United States Constitution, Amendments V, VI and VIII.

V

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense;"

VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Commodity Exchange Act, Title 7, U.S.C., § 15.

"For the purpose of securing effective enforcement of the provisions of this chapter, the provisions, including penalties, of sections 12 and 46-48 of Title 49, as amended and supplemented relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, and said referee in proceedings under this chapter, and to persons subject to its provisions."

Immunity Act of 1954, Title 18, U.S.C., § 3486,

"(c) Whenever in the judgment of a United States attorney the testimony of any witness • • • in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, • • • is necesary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture."

Emergency Price Control Act, 56 Stat. 30 (1942) § 202.

"(a) The Administrator is authorized to make such studies and investigations, and to obtain such information as he deems necessary or proper to

assist him in prescribing any regulation or order under this Act or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 * * * shall apply with respect to any individual who specifically claims such privilege."

Federal Deposit Insurance Corporation Law, Title 12, U.S.C., § 1820.

"(a) The Board of Directors shall administer the affairs of the Corporation fairly and impartially and without discrimination. * * *

"(c) For the purpose of any hearing under this chapter, the Board of Directors, any member thereof or any person designated by the Board of Directors to conduct any such hearing, is empowered to administer oaths and affirmations, subpena any officer or employee of the insured bank, compel his attendance, take evidence, * * *. For the purpose of any hearing, examination, or investigation under this chapter, the Board of Directors may apply to any judge or clerk of any court of the United States * * * to issue a subpoena commanding each person to whom it is directed to attend and give testimony * * * at a time and place and before a person therein specified. * * *

"(d) No person shall be excused from attending and testifying or from producing books, records, or other papers in obedience to a subpena issued under the authority of this chapter on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; • • •

Industrial Alcohol Act, 53 Stat. 363, §3119, Title 26, U.S.C. (1946 Ed.), p. .

"No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpena of any court in any suit or proceeding based upon or growing out of any alleged violation of this part; • • •"

Civil Aeronautics Act, Title 49, U.S.C., Ch. 9, §644(i).

"(i) No person shall be excused from attending and testifying, or from producing books, papers, or documents before the Board, or in obedience to the subpena of the Board, or in any cause or proceeding, criminal or otherwise • • • on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; • • •

Export Controls Act, Title 50, App., U.S.C., §2026.

"(a) To the extent necessary or appropriate to the enforcement of this Act • • • the head of any department or agency exercising any functions hereunder (and officers or employees of such department or agency specifically designated by the head thereof) may make such investigations and obtain such

information from, require such reports or the keeping of such records by, make such inspection of the books, records, and other writings, premises, or property of, and take the sworn testimony of, any person. In addition, such officers or employees may administer oaths or affirmations, and may by subpena require any person to appear and testify * * *.

"(b) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (27 Stat. 443) * * * shall apply with respect to any individual who specifically claims such privilege."

Defense Production Act of 1950, Title 50, U.S.C., App. §2155.

"(a) The President shall be entitled, while this Act [sections 2061-2166 of this Appendix] is in effect and for a period of two years thereafter, by regulation, subpena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [said sections] and the regulations or order issued thereunder. * * *

"(b) No person shall be excused from complying with any requirements under this section or from attending and testifying or from producing books, papers, documents, and other evidence in obedience to a subpena before any grand jury or in any court or administrative proceeding based upon or growing out of any alleged violation of this Act [sections 2061-2166 of this Appendix] on the ground that the

testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture;"

War and Defense Contract Acts of 1951, Title 50, App., U.S.C., §1152.

"(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3) the President may administer oaths and affirmations, and may require by subpena or otherwise the attendance and testimony of witnesses. * * * No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpena, or in any action or proceeding which may be instituted under this subsection, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Second War Powers Act, Title 50, App., U.S.C., §643a.

"For the purpose of obtaining any information or making any inspection or audit pursuant to section 1301, any agency acting hereunder, or the Chairman of the War Production Board, as the case may be, may administer oaths and affirmations and may require by subpena or otherwise the attendance and testimony of witnesses. * * * No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpena, or in any action or proceeding which may be instituted under this section, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Investment Advisers Act, Title 15, U.S.C., §80-b-9.

"(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Investment Companies Act, Title 15, U.S.C., §80a-41.

"(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission, or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Public Utility Holding Company Act, Title 15, U.S.C., §79r,

"(e) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Securities Exchange Act, Title 15, U.S.C., §78u.

"(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required by him may tend to incriminate him or subject him to a penalty or forfeiture;"

Shipping Act of 1916, Title 46, U.S.C., §827.

"No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the Commission or of any court in any proceeding based upon or growing out of any alleged violation of this chapter;"

Narcotics Control Act, Title 18, U.S.C., §1406.

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—* * * is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify * * *. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor

shall testimony so compelled be used as evidence in any criminal proceeding * * * against him in any court.

Natural Gas Act, Title 15, U.S.C., §717m.

"(h) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture;"

Federal Communications Act, 47 U.S.C., §409 (1):

"No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence."

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 388—October Term, 1956.

(Argued May 6-7, 1957 Decided July 10, 1957.)

Docket No. 24626

UNITED STATES OF AMERICA,

Appellee,

v.

EMANUEL BROWN,

Defendant-Appellant.

Before—MEDINA, HINCKS and LUMBARD, *Circuit Judges.*

Emanuel Brown appeals from a sentence of 15 months imprisonment for contempt of court in refusing to answer questions propounded to him before a grand jury in the Southern District of New York in an investigation under the Motor Carrier Act, 49 U. S. C. A., §§301-327. The District Court ordered him to answer, ruling that thereby he received immunity from prosecution under 49 U. S. C. A. §305(d) and §46. Richard Levet, *Judge.* Affirmed.

PAUL W. WILLIAMS, United States Attorney, Southern District of New York, New York, N. Y. (Herbert M. Wachtell, Assistant United States Attorney, of counsel), *for appellee.*

MYRON L. SHAPIRO, New York, N. Y., *for defendant-appellant.*

LUMBARD, *Circuit Judge*:

Emanuel Brown appeals from a judgment of conviction and a sentence of 15 months imprisonment for refusing to answer questions before a grand jury which was investigating alleged violations of the Motor Carrier Act, 49 U. S. C. A. §§301-327 despite assurances that under the applicable provisions of law, 49 U. S. C. A. §§305(d), 46, he would be immune from prosecution regarding any matters concerning which he would be required to testify.

As Brown questions the propriety of the procedure resulting in the judgment, as well as the existence and extent of the immunity conferred and the severity of the sentence imposed, we first consider the sequence of events before the grand jury and the court.

On Friday, April 5, 1957, Brown was called before a grand jury which he attended pursuant to the command of a subpoena. This grand jury was conducting an investigation into an alleged violation of the Motor Carrier Act. Although advised by the Assistant United States Attorney that he could not be prosecuted on account of any matter concerning which he would testify under the Motor Carrier Act, Brown refused to answer these six questions:

"Q. Mr. Brown, are you associated with Young Tempo, Incorporated?

Q. Mr. Brown, does Young Tempo, Incorporated, use a trucking company known as the T and R

Cutting Company or as the T and R Trucking Company?

Q. Mr. Brown, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Brown, are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Brown, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?"

Thereupon the grand jury attended before Judge Levet to seek his aid and assistance in a direction to Brown, who was present with his counsel, that he answer the questions. At the suggestion of the government the courtroom was cleared of all but the interested parties and court personnel, no objection being then made to this procedure.

At this first hearing, government counsel stated that Brown's testimony was sought because Young Tempo, Inc., a New York City dress manufacturing firm in which Brown was a principal, had used the T and R Trucking Company or the T and R Cutting Company for trucking. The government stated that its inquiry was directed to the true ownership of these trucking companies and their operation between New York and New Jersey, contrary to law, without a permit from the Interstate Commerce Commission.

Although Brown's counsel had been advised eleven days before, on March 25, that Brown was to be questioned on these matters under the Motor Carrier Act, he asked for a "reasonable adjournment" and notice of the specifications or charges in order to prepare for the hearing.

When the judge asked counsel what proof he might wish to present, counsel replied that he would like to look into the question of whether he could compel production of the minutes of prior grand jury investigations in which Brown had pleaded the Fifth Amendment.[1]

Brown's counsel asserted the investigation was being used "as a means of circumventing the exercise by Brown of his Fifth Amendment privilege to refuse to testify before the other grand jury," which government counsel denied.[2] There followed a colloquy regarding the existence and scope of the immunity available to a grand jury witness under 49 U. S. C. A. §305(d) and §46, which we treat as the principal questions before us.

The grand jury reporter was then called as a witness and testified that Brown refused before the grand jury to answer each of the six questions on the ground that by answering he might tend to incriminate himself. A recess was taken until Monday afternoon, April 8.

On Monday, Brown and his counsel again appeared before Judge Levet. After the judge had indicated that he would instruct Brown to answer because the statute gave him full immunity, Brown's counsel asked for an adjournment of a day or so for further discussion with his client. The judge refused to allow more than half an hour and

1. These investigations related to the Victor Reisel acid blinding case, and to racketeering in the garment trucking industry.

2. Brown's counsel also stated that the Assistant United States Attorney had threatened Brown with indictment under the revenue laws. There is nothing in the record to substantiate this statement.

directed that the questions be answered before the grand jury at 2:45 P. M. After Brown's reappearance the grand jury returned to the courtroom at 3:15 P. M. and reported Brown's continued refusal to answer. The government then asked that the court again put the questions to Brown and suggested that Brown's persistent refusal in the physical presence of the court would justify his being summarily held in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure.

Brown, who had already been sworn before the grand jury, was called to the stand by the district judge. His counsel objected to this procedure, apparently on the ground that Brown was now a defendant in a criminal contempt case, but this was overruled. The questions were again put by the court and Brown refused to answer each question on the ground that it might tend to incriminate him. After Brown's counsel again repeated his arguments why Brown should not be compelled to answer, the Court adjudged Brown to be in contempt, under 18 U. S. C. A. §401, and sentenced him to be confined for one year and three months.

1. *Immunity under the Motor Carrier Act.*

We start with the general proposition that where Congress has granted immunity from prosecution coextensive with the protection of the Fifth Amendment, the witness may not refuse to testify on the claim that he may incriminate himself. *Brown* v. *Walker*, 161 U. S. 591 (1896) decided that with respect to the same §46 here in question, then 27 Stat. 448, Act of February 11, 1893. *Ullman* v. *United States*, 350 U. S. 422 (1956) is the latest affirmation of this principle with respect to the Immunity Act of 1954.

Brown claims, however, that Congress did not intend to make the immunity provisions of §46 of the Interstate Commerce Act apply to grand jury investigations of alleged offenses under the Motor Carrier Act. We do not agree. We find that a reading of the applicable sections of the Interstate Commerce Act shows that Congress intended that witnesses testifying in a grand jury inquiry under those sections having to do with motor carriers would receive immunity just as if they were testifying in a grand jury inquiry under Title I.

The second clause of 49 U. S. C. A. §305(d) affords immunity in grand jury proceedings under the Motor Carrier provisions, Chapter 8, by incorporating, the "rights, privileges and immunities" and "the duties, liabilities, and penalities" of witnesses as stated in §46 of Title I.

Section 305(d)[3] in its pertinent words provides:

> "* * * and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, * * *."

---

3. Section 305(d) reads: "So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter."

Section 46[4] provides in part:

> "No person shall be excused from attending and testifying * * * in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify * * * in any such case or proceeding; * * *"

It seems to us that the natural meaning of the reference in §305(d) to §46 is that whatever is within the scope of the latter is to be incorporated into the former. Hence the immunity applies to grand jury investigations under Chapter 8, the Motor Carrier Act, just as it does to such investigations under Chapter 1.

Brown's argument is that since the first clause of §305(d) grants investigatory power only to the Commission, for "any matter under investigation," the reference in the immunity clause of §305(d) to "any matter under investiga-

---

4. The full text of §46 is: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or

tion under this chapter" should be read *in pari materia* with the empowering clause to mean "under investigation under this chapter *by the Commission.*" Consequently, §305(d) is limited to hearings before the Commission and does not apply to matters before grand juries and courts. We do not agree. It seems clear that if §46 applies at all it applies equally to "any cause or proceeding, criminal or otherwise." There is no qualifying language. On the contrary, §305(d) in plain words has made the immunity applicable to "*any* matter under investigation under this chapter." [Emphasis added.] This is not limited to any matter under investigation before the Commission. Furthermore, Chapter 8 provides in §322 for criminal prosecutions and penalties for the enforcement of its various provisions, 49 U. S. C. A. §§301-327. Thus the power to compel testimony is as natural to and as much wedded to Chapter 8 as it is to Chapter 1. Moreover, we are unable to see anything peculiar to motor carrier investigations which would justify a construction of the immunity provision narrower than that applicable to investigations relating to the other forms of transportation under the Interstate Commerce Act.

The language is clear, the construction for which the government contends is practical and sensible, and there is no reason why we should not construe the language

---

in any such case or proceeding; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

5. Congress has made grants of immunity applicable to grand jury proceedings under numerous statutes both before and after enactment of the Motor Carrier Act in 1935, among others: (1893) Interstate Commerce Act, now 49 U. S. C. A. §46; (1903) Anti-Trust Laws, 15 U. S. C. A. §32; (1916) Shipping Act, 46 U. S. C. A. §827; (1919) National Prohibition Act, 41 Stat. 317; (1934) Securities and Exchange Act, 15 U. S. C. A. §78u(d); 1934 Federal Communications Act, 47 U. S. C. A. §409(e); (1935) Industrial Alcohol Act, 26 U. S. C. A. §5315; (1935) Internal Revenue Act, 49 Stat. 875, now §5315, Internal Revenue Code of 1954, 26 U. S. C. A. §5315; (1937) Bituminous Coal Act, §8(b), 50 Stat. 87; (1938) Civil Aeronautics Act, 49 U. S. C. A. §644(i); (1940) Water Carriers Act, 49 U. S. C. A. §916(a); Freight Forwarders Act, 49 U. S. C. A. §1017(a); (1954) Immunity Act of 1954, 18 U. S. C. A. §3486(c); and (1956) Narcotics Control Act, 18 U. S. C. A. §1406.

according to its plain meaning.[5] *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 278 (1929).

Brown's second argument is that even if §305(d) incorporates the immunity granted by §46, this is inadequate protection. He claims that it does not provide immunity for offenses not related to violations of the Motor Carrier Act because the immunity under §305(d) can be granted only "so far as may be necessary for the purposes of this chapter."

We do not believe the immunity is so limited. The statutory language does not imply that immunity is to be limited to offenses under the Motor Carrier Act; immunity for an offense under the revenue laws may be equally necessary "for the purposes of this chapter," precisely for the reasons suggested in this case. The scope of immunity must be as broad as the scope of incrimination, see *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), and we

---

5. Congress has made grants of immunity applicable to grand jury proceedings under numerous statutes both before and after enactment of the Motor Carrier Act in 1935, among others: (1893) Interstate Commerce Act, now 49 U. S. C. A. §46; (1903) Anti-Trust Laws, 15 U. S. C. A. §32; (1916) Shipping Act, 46 U. S. C. A. §827; (1919) National Prohibition Act, 41 Stat. 317; (1933) Securities Act of 1933, 15 U. S. C. A. §77v(c); (1934) Securities and Exchange Act, 15 U. S. C. A. §78u(d); (1934) Federal Communications Act, 47 U. S. C. A. §409(e); (1935) Industrial Alcohol Act, 26 U. S. C. A. §5315; (1935) Internal Revenue Act, 49 Stat. 875, now §5315, Internal Revenue Code of 1954, 26 U. S. C. A. §5315; (1935) Federal Power Act, 16 U. S. C. A. §825f(g); (1935) Public Utility Holding Company Act, 15 U. S. C. A. §79r(e); (1937) Bituminous Coal Act, §8(b), 50 Stat. §87; (1938) Civil Aeronautics Act, 49 U. S. C. A. §644(i); (1938) Natural Gas Act, 15 U. S. C. A. §717m(h); (1940) Investment Advisors Act, 15 U. S. C. A. §80b-9(d); (1940) Investment Companies Act, 15 U. S. C. A. §80a-41(d); (1940) Water Carriers Act, 49 U. S. C. A. §916(a); (1942) Second War Powers Act, 50 U. S. C. A. App. §643(a); (1942) Freight Forwarders Act, 49 U. S. C. A. §1017(a); (1954) Immunity Act of 1954, 18 U. S. C. A. §3486(c); and (1956) Narcotics Control Act, 18 U. S. C. A. §1406.

see no reason to think that any court will construe it more narrowly. Thus where Congress has said that the witness "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, * * *" Congress has said that the witness cannot and will not incriminate himself by answering questions. This covers, and is meant to cover, everything which may be testified to, "any transaction, matter or thing." *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2 Cir. 1944).

Should proceedings ever be brought against Brown regarding any transaction, matter or thing concerning which he testifies, he has a complete defense at that time. The immunity attaches with the testimony. *United States* v. *Monia,* 317 U. S. 424 (1943); *United States* v. *Andolschek, supra.* Even though the witness is already under indictment he must testify as he thereby is put beyond the reach of further prosecution. That much was decided by Judge Learned Hand in 1910 in *In re Kittle,* 180 Fed. 946, and this principle has never been questioned in any reported case. From this it follows that Brown has no right to remain silent because of some fancied prosecution which may never happen. It is enough for him to know that he is fully protected. The government has been empowered by Congress to pay the price of immunity for Brown's testimony. Should the need ever arise the courts will see to it that the bargain is fully kept.

Thus it follows that what may have happened when Brown testified before other grand juries is irrelevant in the light of the fact that he would receive immunity when he testified in the investigation under the Motor Carrier Act, and the district judge correctly refused to consider what Brown may have testified to previously or what may have transpired before those grand juries.

2. *The Validity of the Procedure.*

Brown further complains that in the District Court proceedings he was deprived of his rights to notice and a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure, and that the fundamental safeguards due him in a criminal proceeding were not accorded. We disagree.

In cases where the witness is instructed by the Court and he refuses in the presence of the Court to comply with its order, we look to subsection (a) of Rule 42 which reads:

> "(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

The Court having properly ruled that Brown must answer the questions, it was in order for the Court to require Brown to return to the grand jury and answer. When Brown persisted in his refusal to answer and repeated that refusal before the Court, Brown had disobeyed a lawful order of the Court, 18 U. S. C. A. §401(3) and as his disobedience and contempt of the Court's order had taken place in the "actual presence" of the Court, the judge was empowered under Rule 42(a) forthwith and summarily to punish Brown.

Brown and his counsel were afforded every reasonable opportunity to be heard regarding Brown's claim of privilege and the Court's proposed action thereon. While the issue had some novel aspects under the Interstate Commerce Act, counsel was advised of them well in advance of

the first hearing on April 5 when the questions were first put to Brown. At that time and thereafter on April 8 the judge afforded Brown and his counsel full opportunity to be heard. The procedure here followed is almost identical with that which was before us in *United States* v. *Gordon*, 236 F. 2d 916 (1956); *United States* v. *Courtney*, 236 F. 2d 921 (1956); *United States* v. *Curcio*, 234 F. 2d 470 (1956), reversed by the Supreme Court on other grounds, June 10, 1957; *United States* v. *Trock*, 232 F. 2d 839 (1956), reversed on other grounds 351 U. S. 976 (1956). See also *Carlson* v. *United States*, 209 F. 2d 209 (1 Cir. 1954).

The procedure which was followed here fully accorded to Brown all his rights under §42(a): he was given ample notice, he was represented by counsel and his counsel was fully heard.

There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, multiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary. The district judge acted promptly and with commendable diligence. At the same time he afforded Brown and his counsel a full and adequate hearing at which all the points raised in this court, save one, were discussed.

The one point which was not raised below was the secrecy of the proceedings. Not having objected to the clearing of the courtroom at the time, we do not see how Brown can be heard to complain now. So long as the witness' counsel

was there to represent him and to make protest Brown has no standing to complain now. *In re Oliver*, 333 U. S. 257 (1948) is not in point as there the state judge, who was himself the one-man grand jury, forthwith convicted the petitioner in a secret session without any advance notice and without allowing him any time to consult counsel.

Finally, Brown's contention that he was entitled to the right of a criminal defendant to refuse to answer any questions before the district judge is rejected. In the first place, this hearing before the district judge was, despite Brown's argument to the contrary, merely a proceeding ancillary to the grand jury investigation and not a criminal proceeding. In the second place, preventing the Court from inquiring of the witness whether he is willing to answer questions would frustrate the proper operations of the grand jury, and without affording the witness any protection which is not already accorded him. The Court is merely being advised as to what had already happened before the grand jury. Brown had already made it clear, both to the grand jury and the Court that he refused to answer. Had Brown remained mute and refused to speak at all, the result would have been the same.

Brown further complains that a sentence of 15 months constitutes cruel and unusual punishment in violation of the Eighth Amendment, or, in any event, an abuse of the Court's discretion. We find no merit to either of these contentions.

There is no statutory maximum which governs the power of the district court judges to sentence for contempts committed in their presence. Therefore unless the punishment offends the prohibition of the Eighth Amendment by reason of its cruel and unusual nature we must affirm the sentence imposed. For failure to produce books subpoenaed by a grand jury it has been held that 18

months imprisonment is not excessive. *Lopiparo* v. *United States,* 216 F. 2d 87, 92 (8 Cir. 1954), cert. denied 348 U. S. 916 (1955). We have heretofore sustained sentences up to three and four years where defendants have violated court orders to surrender, *United States* v. *Thompson,* 214 F. 2d 545 (2 Cir. 1954), cert. denied 348 U. S. 841 (1954); *United States* v. *Hall,* 198 F. 2d 726 (2 Cir. 1952), cert. denied 345 U. S. 905 (1953); and *United States* v. *Green,* 241 F. 2d 631 (2 Cir. 1957), cert. granted May , 1957.

That it has long been understood that the district courts have a considerable latitude in contempt sentences is further borne out by such cases as *Warring* v. *Huff,* 122 F. 2d 641 (D. C. Cir.), cert. denied 314 U. S. 678 (1941), two consecutive sentences of 13 months; *Conley* v. *United States,* 59 F. 2d 929 (8 Cir. 1932), two years; and *Hill* v. *United States,* 300 U. S. 105 (1937), concurrent sentences of a year and a day and two years. In view of these precedents it cannot be said that there was anything cruel or unusual about the sentence of 15 months which was imposed here.

Nor was the district court obliged to provide that the contemnor might purge himself. The judge fully considered whether he should so sentence Brown, and for good and sufficient reasons the sentence was unconditional. Indeed, we are not advised that Brown desires to purge himself.

There is no point in inquiring into whether the district judge meant the sentence to be coercive or punitive. The sentence was well within the power of the district court and that is the only question into which we may inquire.

The judgment is affirmed.